United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1280
74-1281

ORIGINAL

B P/S

To be argued by
JULES E. COVEN

In The

United States Court of Appeals

For The Second Circuit

CHIM MING,

Plaintiff-Appellant,

vs.

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants-Appellees.

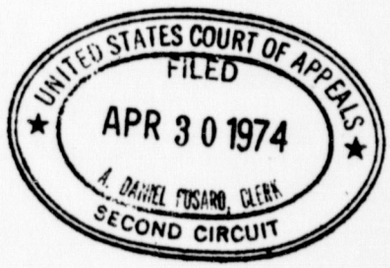
LAM YIM YIM, et al.,

Plaintiffs-Appellants,

vs.

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York,

Defendant-Appellee.



BRIEF AND APPENDIX FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Cases Cited

Statutes Cited

Authorities Cited

To be argued by

JULES E. COVEN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74 - 1280 - 1281

CHIM MING,

Plaintiff-Appellant,

- against -

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants-Appellees.

LAM YIM YIM, et al,

Plaintiffs-Appellants,

- against -

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York,

Defendant-Appellee.

BRIEF OF PLAINTIFFS-APPELLANTS.

The appellants appeal from a decision and order of the District Court for the Southern District of New York

(Carter, D.J.) granting summary judgment to the appellees, dismissing appellants' complaint.

QUESTIONS INVOLVED

1. Are aliens who are refugees, presently in the United States, eligible for the benefits of the United Nations Protocol relating to the status of refugees and entered into force with respect to the United States on November 1, 1968, notwithstanding the fact that they have violated their immigration status in the United States?

2. What is the meaning of the term "lawful" as it appears in Article 32 of the Protocol?

3. Did the Government abuse its discretion by raising an argument contrary to its consistent administrative policy when it considered the manner of entry and the status of the appellants in the United States when the Government denied their applications for refugee status?

4. Was the Immigration Service in error when it did not forward the request for asylum of LAM YIM YIM to the Department of State?

TREATY and POLICY STATEMENT INVOLVED

PROTOCOL RELATING TO THE STATUS OF REFUGEES

ARTICLE 1 of the TREATY

DEFINITION OF THE TERM "REFUGEE"

A. (1)....and (2)....owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it

ARTICLE 32

EXPULSION

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuant of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

POLICY STATEMENT

DEPARTMENT OF STATE

January 4, 1972

GENERAL POLICY FOR DEALING WITH REQUESTS FOR ASYLUM BY FOREIGN NATIONALS

POLICY

Both within the United States and abroad, foreign nationals who request asylum of the United States Government owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily or summarily refused by U. S. personnel. Because of the wide variety of circumstances which may be involved, each request must be dealty with on an individual basis, taking into account humanitarian principles, applicable laws and other factors.

In cases of such requests occurring within foreign jurisdiction, the ability of the United States Government to give assistance will vary with location and circumstances of the request.

U. S. OBJECTIVES

A basic objective of the U. S. is to promote institutional and individual freedom and humanitarian concern for the treatment of the individual.

Through the implementation of generous policies of asylum and assistance for political refugees, the United States provides leadership toward resolving refugee problems.

BACKGROUND

A primary consideration in U. S. asylum policy is the Protocol Relating to the Status of Refugees, to which the United States is a party. The principles of asylum inherent in this international treaty (and in the 1951 Refugee Convention whose substantive provisions are by reference incorporated in the Protocol) and its explicit prohibition against the forcible return of refugees to conditions of persecution, have solidified these concepts further in international law. As a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to jurisdiction of the United States.

United States participation in assistance programs for the relief of refugees outside United States jurisdiction and for their permanent resettlement in asylum or other countries helps resolve existing refugee problems.

It also avoids extensive accumulation of refugees in asylum countries and promotes the willingness of the latter to maintain policies of asylum for other arriving refugees.

President Nixon has reemphasized the United States commitment to the provision of asylum for refugees and directed appropriate Departments and Agencies of the United States Government, under the coordination of the Department of State, to take steps to bring to every echelon of the United States Government which sould possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment.

THE FACTS

The appellants are all natives and citizens of the Mainland of China. The Mainland of China is presently under the control of the Peoples' Republic of China, a Communist Government. The appellants all allege and contend that they fled from China owing to a well-founded fear of being persecuted for reasons of their political opinions and they are unable and unwilling to return to their homeland owing to such fear.

The appellant, CHIM MING, fled from China in 1955 and arrived in the United States in April of 1967.

The appellant, LAM YIM YIM, fled from China in 1961, resided in Hong Kong for three months, and arrived in the United States in 1972.

After their entries into the United States, each of the appellants were accorded hearings in deportation and they were found to be deportable as charged. CHIM MING made no application for relief in 1968 when he had his hearing; LAM YIM YIM was granted the privilege of voluntary departure.

CHIM MING was called upon to surrender for deportation in November of 1972. At that time, appellant CHIM MING, submitted an application for a stay of deportation, coupled with an application for political asylum or temporary refuge in the United States pursuant to the provisions of the Policy Statement of the Secretary of State of January 4, 1972, formally published as Public

Notice 351 in the Federal Register of February 16, 1972, 37 F. R. 3447. At that time he was granted a temporary stay of deportation pending consultation by the Immigration Service with the State Department to determine the validity of his claim. In his application for asylum the appellant, CHIM MING, stated that he had fled from China because of the Communist control of that country and, that he never established permanent residence in any country other than the Mainland of China. Thereafter, on January 16, 1973, he was advised by the Immigration Service that, after consultation with the Department of State, it had been determined that there "is no basis for granting your request for political asylum". This statement was based upon a letter from the Department of State which stated that Mr. Chim had not made a valid case to remain in this country as a political refugee, indicating that his application was acted upon and considered on the merits.

The appellant, LAM YIM YIM, received a Notice to Surrender for Deportation on April 2, 1973. At that time, the appellant, LAM YIM YIM, submitted a similar application as that made by appellant, CHIM MING, to the Immigration Service in New York. At the time of the submission of the application, he was advised that his application would not be forwarded to the State Department, but that a decision would be made by the Immigration Service in New York and that his application for a stay of deportation

would not be granted. The instant action on behalf of LAM YIM YIM was commenced at that time and Mr. Lam's deportation was stayed administratively pending determination of the instant litigation.

The basis for the Policy Statement of January 4, 1972 is the International Treaty entered into by the United States on November 1, 1968, to wit, the Protocol relating to the status of refugees. It is the contention of the appellants that they are refugees as defined in Article 1(A)(2) of the Protocol, in that, owing to a well-founded fear of being persecuted, they are outside the country of their nationality and are unable and unwilling to return to it and, therefore, being refugees, are entitled to the benefits accorded them in the Protocol. In fact, Judge Carter, in his opinion in this matter assumed that the appellants were refugees for the purposes of his decision. Article 32 states that a refugee shall not be expelled except on grounds of national security or public order. In view of the fact that the appellants fall directly under the definition of "refugee" as stated in the Treaty, and, in view of the fact that the Government is attempting to deport them, the instant action was commenced to declare the acts of the appellees illegal and in violation of the Treaty.

The instant case was then heard by Judge Carter

on the appellants' application for preliminary injunction and the Government's motion for summary judgment. Judge Carter ruled that since the appellants were unlawfully in the United States, they were ineligible to apply for the benefits of the Treaty and he, therefore, granted summary judgment in favor of the Government and dismissed the complaint.

POINT I

THE APPELLANTS ARE REFUGEES AND SHOULD BE PROTECTED BY THE TERMS OF THE TREATY.

The basis of the appellants' action is the Treaty signed by the then President of the United States upon the consent of the Senate and made effective November 1, 1968. Pursuant to the United States Constitution, Article 6, Clause 2, a Treaty, when made, is law. The general rule is that treaties are to be liberally construed with a view to enlarging the rights granted - Nielsen v. Johnson, 49 S. Ct. 223, 279 U. S. 47. It has been held that treaties and statutes are on the same level and the latest action expresses the controlling law - Brandon v. Denton, 302 Fed. 2nd 404.

In the case at bar, the appellants claim to be refugees. The facts are not in dispute. They left Red China because of the Communist Government. They are unwilling to return to the country of their nationality because of the Communist Government in that country. The definition of "refugee" as set forth in Article 1(A)(2) in the Treaty, is as follows:

> "....owing to well-founded fear of being persecuted for reasons of race,religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear,

> is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it".

The Immigration Service, in notices sent to the aliens, indicated that the denials of the applications for "refugee" status were made without reference to the country of nationality of the appellants, to wit, Red China. The denials dealt solely with Hong Kong which, obviously, showed that the appellees were not considering the definition of "refugee" as it appears in the Treaty. By the mere reading of the Treaty, it is obvious that the aliens herein fit the definition of "refugee" as defined in the Treaty.

It is apparent that the Immigration Service and the Department of State are not considering the appellants' applications as refugees with reference to the definition of "refugee" as it appears in the Treaty and, therefore, the decisions of the Immigration Service and the Department of State are in error and the aliens are entitled to relief. In the applications submitted to the Immigration Service and the State Department, the appellants stated that they fled from China and this was the basis of their claim for relief. There was practically no interrogation or questioning of the aliens with reference to their claims that they be classified as refugees from China.

On May 25, 1972, Mr. H. L. Hardin, Assistant Commissioner, Inspections, Immigration and Naturalization

Service, in a statement made at the Conference of the Association of Immigration and Nationality Lawyers in New Orleans, Louisiana, stated:

> " I think I should mention that the definition of "Refugee" under the Protocol is broader than that contained in Section 203(a)(7) of the Act. The Protocol, which adopts the "Refugee" definition of the 1951 Convention, covers anyone outside of the country of his nationality owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group, or political opinion".

He also stated the following:

> "Before we get to Section 243(h), I would like to mention Article 32 of the 1951 Convention. This article provides that:
>
> > "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."
>
> It will be noted that Article 32 is applicable to refugees "lawfully in the territory" of the contracting States. In this connection a communication from the office of the United Nations High Commissioner for Refugees reads as follows:
>
> > 'In determining whether a refugee is "lawfully in the territory" of a Contracting State, regard must be had to all the circumstances of his presence there and, in this respect, the manner in which he originally entered the territory, i.e. Lawfully or unlawfully, is not the only decisive factor.'"

His remarks were published by the "Interpreter Releases", a publication of the American Council for

Nationalities Service, Vol. 49, No. 35. From his remarks, it can be seen that the Treaty provisions are different from the Immigration statutes relating to refugees.

It is interesting to note that when the Senate approved the signing of the Protocol, they made two reservations: (one) dealing with the taxing of refugees who are not residents of the United States; and (two) the reservation with reference to any conflict it might have with the Social Security Act of the United States. No mention is made of any conflict with the Immigration and Nationality Act. The reservations recognize the difference between refugees in the United States and other aliens in the United States. Thus it can be seen that the Treaty granted rights to refugees outside of the ordinary operation of the Immigration laws. The purpose of the Treaty and of the operating instructions is to help resolve existing refugee problems in the world. The interpretation urged by the aliens certainly fulfills the purpose of the Treaty and the Policy Statement, in that, it would help to relieve problems in the Far East. The appellants herein are persons who are refugees in Hong Kong. They do not have the ordinary travel documents of a person who is a citizen of Hong Kong , in fact, the document that they carry, to wit, a Hong Kong Seaman's Identity Book, is valueless except while being used by the alien while at sea and is valid only for return to Hong Kong.

It is further alleged and it is the belief of the writer that if the aliens wished to return to Hong Kong by their own means, they would have to surrender the Seaman's Book to the Hong Kong authorities and the only permission they would obtain would be a visa to return to Hong Kong. Their status is essentially different from persons holding passports to Hong Kong, since a passport from Hong Kong can be used to enter other countries and is not issued merely for the return of persons to Hong Kong and no other place.

On July 25, 1973, the Immigration Service issued operating instructions with reference to requests for asylum of persons in the United States - 108.1F. The Immigration Service uses the term "home country". This definition is different from the definition spelled out in the Treaty. The definition used in the operating instructions is as follows:

> "(3)(g).
>
> Definition of "home country". The term "home country" as used in this 0.1 means the country of birth or nationality or country in which firmly resettled".

This appears on Page 618.16 of the operating instructions handbook of the Immigration and Naturalization Service. As can be seen from the definition, the Government seeks to impose an additional fact in its definition, to wit, "firmly resettled". If the Government is considering that

the appellants are firmly resettled, this position should have been communicated to the aliens and a hearing or some form of due process should have been granted to them to prove that they were not firmly resettled, or, the Government should have alleged facts in its decision to indicate that they were firmly resettled. It is the position of the appellants that the question of "firmly resettled" is not an issue, but, if it is an issue, there certainly should have been a full hearing in which this question could be developed.

As previously stated, the claim of the appellants that they are refugees from China and their claim that they had not obtained permanent residence in any other country, were never investigated by the Immigration and Naturalization Service or by the State Department. It is obvious from the decision of the State Department and the Immigration and Naturalization Service that the standards they used in these cases were improper. It is urged by the refugee applicants that, had the State Department used the correct definition as set forth in the Treaty, they would have found the aliens to be refugees and would have granted them the requested relief. However, the State Department, having found the aliens not to be refugees, went no further and denied the applications of the Chinese. Thus fortified, the Deportation

Branch of the Immigration Service denied the requests for stays and then the reason for the denials was justified by the response of the Government to the complaint in this action which raised a strict interpretation of a Treaty that has, as its main purpose, humanitarian concerns.

POINT II

THE REFUGEE APPELLANTS SHOULD BE GRANTED THE PROTECTION OF ARTICLE 32 OF THE TREATY.

Article 32 of the Treaty prohibits the expulsion of refugees from the territory of the signatories to the Protocol. As stated heretofore in Point I and, as stated in the opinion below, it appears that CHIM MING and LAM YIM YIM are refugees pursuant to the Treaty. However, they are being denied any relief because they did not file their applications prior to the expiration of their initial admission to the United States, a bar to relief which was raised for the first time by the Government's attorneys.

The decision of the Court below, finding that the appellants were ineligible for relief, is in error

for a number of reasons. The first and possibly the most important reason is that the appellees, Immigration Service and Department of State, had always interpreted the Treaty in a different fashion. The cases at the bar were considered by the State Department and by the Immigration Service upon the merits of the aliens' claim for refugee status. The Immigration Service and the Secretary of State had never considered the immigration status of an asylum seeker when considering the asylum application. In fact, the decisions in these cases by the Secretary of State show conclusively that they were considered on the merits and were not found to be statutorily ineligible. (See Appendix Section, Page 3a, decision dated December 20, 1972: " Based on the information presented, Mr. Chim has not made a valid case to remain in this country as a political refugee .....Should Mr. Chim present additional information which to the Service seems to require further review, we will be glad to do so".) (Also, see Appendix Section, Page 4a , letter from Sol Marks, District Director to the Department of State.)

It is also apparent from the letter cited by Judge Carter in his opinion below, where he quoted from the Office of Refugee and Migration Affairs, to Mr. James Green of the Immigration Service. See Appendix, Page 5a of the decision where the letter clearly indicated that the lawfulness of the alien status in the United States

was not a factor that the Department of State considered.

The question of lawfulness was raised for the first time by the Immigration Service in the United States District Court for the District of New Jersey, see, KAN KAM LIN vs. RINALDI, et al, 361 F. Supp. 177 (D.N.J. 1973) affirmed by the United States Court of Appeals for the Third Circuit on March 25, 1974. The original decision by the agency in these cases did not incorporate the question of lawfulness until it was raised by the United States Attorney at the argument on the original motion. It is also the position of the petitioners herein that the Government's original approach to the question of lawfulness is still being followed by the State Department and the Immigration Service in their refugee asylum cases.

Before these actions were commenced, the meaning of the word "lawful" as stated in Article 32 of the Treaty had not yet been defined. The Government now urges a strict interpretation claiming that the word "lawful" is synonymous with being in the United States in a legal status under our Immigration Laws. It is urged by the writer that it is not synonymous with the deportation sections of the United States Immigration Laws. There are numerous situations where a person can be lawfully in the United States in a non-technical sense

and still be under an Order of Deportation. It is not unusual for an alien, after conceding deportability, to be granted the privilege of voluntary departure (as was done in these cases) and be allowed to remain in the United States for an indefinite period of time, even though he is under an Order finding him to be deportable from the United States. Such a person would be in the United States lawfully, that is, with the permission of the Immigration and Naturalization Service.

Another situation common to the U. S. Immigration Laws is that of a person who violates his status but the Immigration Service for some reason or other not wishing to deport him, grants the alien an indefinite stay of deportation either before or after a hearing before an Immigration Judge. Such a person would be allowed to remain in the territory of the United States, although deportable, and yet, it could not be alleged that he is here unlawfully or without the permission of the authorities.

Another example, which could be more closely associated with the cases at the Bar, would be that of an alien who at his deportation hearing conceded his deportability and asked that his deportation be stayed pursuant to Section 243(h) of the Immigration and Nationality Act. If the application is granted, the decision is that the alien is deportable, but he shall

be granted a temporary stay of deportation. Such an alien certainly is illegally in the United States, however, he is here with the permission of the authorities and is allowed to remain with the permission of the authorities. Such a person is lawfully in the territory of the United States.

If the word "lawful" is to be interpreted as the lower Court rules, it would, in fact, make the Treaty a nullity since ordinarily the only persons who would apply for the benefits of the Treaty would, by necessity, be in the United States in violation of the Immigration Laws. If this is so, we can see that the definition of the word "lawfully" must mean less than the finding that a person is a non-deportable alien. For example, if a person enters as a crewman and applies for refugee status prior to the expiration of the 29 days he is permitted to remain in the United States it would, at that very moment, make him a deportable alien under the Immigration Laws of the United States since he would be violating the condition of his admission and, therefore, "unlawfully in the United States pursuant to the Immigration Laws". (See Section 252(b) of the Immigration and Nationality Act, as amended). To make the Treaty more operable there must be a liberal construction of the words "lawfully in their territory".

The former Secretary of State, Dean Rusk, in his Letter of Submittal transmitted to the then President of the United States, dated July 25, 1968 stated:

> "As refugees by definition are without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health or economic dependence".

From this quotation, we can see that a refugee should not be deported on mere technical grounds if he is once found to be a refugee. The decision arrived at by the District Director and upheld by the Court below is, indeed, a harsh one. It, basically, would eliminate just about all refugees in the United States from seeking relief under Article 32 of the Treaty. The main thrust of the Protocol is the humane treatment of refugees. The Treaty was not entered into by the United States as a mere useless gesture, but as a viable document as stated in the General Policy Statement of the Department of State of January 4, 1972 (to wit:)

> "President Nixon has reemphasized the United States commitment to the provision of asylum for refugees and directed appropriate Departments and Agencies of the United States Government, under the coordination of the Department of State, to take steps to bring to every echelon of the United States Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment".

The interpretation urged by the appellants herein is further substantiated by the recent enactment of 8 C. F. R. 223a.3, which states:

"223a.3 ELIGIBILITY

> Any alien physically present in the United States may apply for a refugee travel document if he believes he is a refugee. A refugee travel document shall be issued to a refugee whose presence in the United States is lawful unless compelling reasons of national security or public order otherwise require. A refugee travel document may be issued, in the exercise of discretion, to any other refugee unless reasons of national security or public order otherwise require...".

From this regulation it appears obvious that all refugees in the United States may obtain travel documents which would permit such refugees to reenter the United States. The regulations, obviously recognize that a person who is illegally or unlawfully in the United States could still gain the benefits of the Protocol when they make the statement, "any other refugee".

Prior to January 4, 1972 neither the Immigration Service nor the State Department had any procedure for the processing or accepting applications for asylum pursuant to the Treaty. After January 4, 1972 certain procedures were set in motion. At that time and up to the present time the Immigration Service and State Department were and are accepting applications without regard to the deportable or non-deportable status of the applicant. It had been the practice when these applications were submitted to the Immigration Service, that the immigration status of the claimed refugee was ignored or not considered.

In further support of the position of the appellants that the "lawful" question was an afterthought raised after the institution of the litigation by the appellants, the Court's attention is directed to the "Operations Instructions" issued on July 26, 1972, namely, "Operations Instructions, 108.1(f). These directions are the procedures that are to be followed by the Immigration Service when requests for asylum are made by alleged refugees. It states:

> "108.1(f) - ALIENS WITHIN THE UNITED STATES. (1) ASYLUM REQUEST PRIOR TO DEPORTATION HEARING. Any alien within the United States who requests asylum, including a crewman or stowaway, shall be interviewed as set forth in 01 108.1(a)."

It is obvious that the "stowaway" they speak about must be one who is in the United States in violation of the immigration laws. However, it is also obvious that such a person is entitled to have his application for asylum ruled upon on the merits. Thus we can see that here, again, the Immigration Service and the State Department have indicated that their intention is to read the Treaty the way the aliens claim it should be read. (Incidentally, the way it has been read where other aliens have been involved).

This writer, would request, at this stage for the Government to submit for inspection to the Court several decisions [illegible] where asylum has been granted by the State Department. The writer feels sure

that the aliens who were granted asylum in these other cases would be in the United States in violation of the Immigration Laws. Possibly, this would be one of the ways for the contention of the appellants to be proven.

It is the position of the appellants that the Government, by now raising an argument contrary to its consistent administrative policy, makes the decision one that is arbitrary and capricious. By this, the appellants mean that the Immigration Service and the State Department were and are accepting and ruling upon the merits of the applications submitted by persons claiming to be refugees without regard to the manner of entry or the status of the aliens in the United States. Their practice and procedure was and is to consider the applications of persons claiming to be refugees without regard to the immigration status of the aliens involved.

As this Court has stated, discretion would be abused, to wit: HANG vs. INS, 360 F. 2d,715,719 (2nd Circuit 1961).

> "If it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group."

POINT III

THE IMMIGRATION SERVICE ERRED WHEN IT DID NOT FORWARD THE CASE OF LAM, YIM YIM TO THE DEPARTMENT OF STATE IN WASHINGTON

The case of LAM, YIM YIM differs from the case of CHIM MING, in a procedural manner. The case of CHIM MING was forwarded to the State Department for consultation so that their opinion could be requested. It is the understanding of the writer that in March of 1973 there was a change in this procedure and cases of aliens like CHIM MING and LAM, YIM YIM are not now forwarded to the State Department in Washington, but they are ruled upon by the Immigration Service in New York. This is a further indication that the definition of "refugee" as urged by the appellants is not being considered by the appellees. It also demonstrates that these cases are not being handled on an individual basis but are being summarily denied without regard to the particular facts or circumstances that are present in each individual case and in violation of the provisions of the Policy Statement of the Secretary of State of January 4, 1972 (formally published as Public Notice 351 in the Federal Register of February 16, 1972.)

The internal memorandum implementing this procedure also further indicates that these cases are being handled in a different manner from other aliens.

It also indicates that even as late as February 14, 1973 the Immigration Service did not advise their operating officers that the test for "refugee status" was whether or not the application was "lawful" or "unlawful" in the United States. (See Appendix, Page 7a).

This action requests the first meaningful interpretation of a Treaty entered into by the United States over five years ago. The Policy Statement of January 4, 1972 was the first implementation by the United States of the Protocol. The regulations with respect to the refugee travel document is a further extension and an indication of our Government's commitment to the refugee problem. The decision of the Court below clamps a lid on a humanitarian document. The interpretation urged by the appellants does not create any new class of aliens or quota numbers under our present immigration system. The aliens granted relief under the Protocol would not be permanent residents and our quota limit would not be violated. The only relief that would be granted would be limited in nature and scope. The aliens would merely be granted temporary stays of deportation which would be subject to review annually. If the world situation changes, the aliens would be forced to leave. This would not be an increase in the number of aliens admitted to the United States under our quota system. Justice demands that the Treaty be liberally construed.

CONCLUSION

THE ORDER AND JUDGMENT BELOW SHOULD BE REVERSED

Respectfully submitted,

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JULES E. COVEN,
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MARTIN R. GREENBERG,
On the Brief.

APPENDIX TO APPELLANTS' BRIEF

DOCKET ENTRIES

CHIM MING
Docket No. 74-1280

DOCKET ENTRIES

LAM YIM YIM
Docket No. 74-1281

DEPARTMENT OF STATE

Washington, D.C. 20520

IMM. & NAT. SERV.
N.Y. N.Y.
1973 JAN -3 PM 12. 57

December 20, 1972

Dear Mr. Marks:

Thank you for your letter of December 12, 1972, concerning the request for political asylum of Chim Ming, (A16 026 481 DB/JH), a citizen of the People's Republic of China.

Based on the information presented, Mr. Chim has not made a valid case to remain in this country as a political refugee. Therefore, on the understanding that Hong Kong is to be the place of deportation and that the Colony is willing to accept deportation of the subject, we are unable to conclude that Mr. Chim should be exempted from regular immigration procedures on the grounds that he would suffer persecution on account of race, religion, nationality, political opinion, or membership in a perticular social group. Should Mr. Chim present additional information which to the Service seems to require further review, we will be glad to do so.

Sincerely,

Raymond W. Lange
Director
Office of Refugee and
Migration Affairs

Mr. Sol Marks,
District Director,
Immigration and Naturalization Service,
20 West Broadway,
New York, New York 10007.

January 16, 1973

A16 026 451 DB/JH

CHIM Ming
305 Broome Street Apt. 11
New York, New York

Dear Sir:

Reference is made to your request for political asylum filed on November 27, 1972.

In Consultation with the Department of State, this Service has determined that there is no basis for granting your request for political asylum.

This finding does not preclude you from filing a motion to reopen deportation proceedings for the purpose of introducing an application to withhold deportation under Section 243 (h), if you so desire.

Very truly yours,

Sol Marks

Sol Marks
District Director
New York, District

cc: Jules Coven, Esq.
1 East 42nd Street
New York, New York

TPC

DEPARTMENT OF STATE

Washington, D.C. 20520

TC
2

January 22, 1973

Dear Mr. Greene:

Thank you for your letter of November 17, 1972, (CO 212.32-P). We recognize the problems raised by last-minute requests for asylum from aliens who could have applied earlier for a hearing under Section 243(h) of the Immigration and Nationality Act.

In your letter you refer to the specific problem of citizens of the Peoples' Republic of China who fled to Hong Kong and have resided there for a substantial period of time. There is no likelihood that these aliens will be persecuted within the meaning of the Convention on Refugees if they are deported to Hong Kong nor have we any specific reason to believe that any of such persons will be returned by that government to countries where they will face such persecution. Our policy is to deny such requests for asylum provided: (a) they are deported to Hong Kong and not the Peoples' Republic of China and (b) that the Colony will accept them.

We agree that such last minute requests concerning the return of Chinese to Hong Kong as described above can be handled by the Immigration and Naturalization Service without consultation with the Department through our office. We understand from your letter that during the deportation hearings all such aliens will have available to them the various benefits of the Immigration and Nationality Act, including withholding of deportation under Section 243(h) and the application of the Convention on Refugees whenever appropriate in their cases. If there are any questions concerning individual asylum requests in such cases or if a case appears to be politically sensitive, we are prepared to provide you with an advisory opinion by telephone or in writing on an urgent basis.

Mr. James F. Greene,
Associate Commissioner for Operations,
Immigration and Naturalization Service,
Room 743, 119 D Street, N.E.,
Washington, D.C. 20536.

With regard to the broader issue of deportation to non-communist countries of nationality, we believe these cases should continue to be referred to ORM. Persecution is unfortunately not confined to communist countries. In developing nations, it is much more possible to have a transition overnight from a government in which persecution does not exist to one where it does. With regard to developed nations, while we might be able to grant INS authority to act without consulting ORM regarding deportation cases to some such countries, we would wish to review all possible cases in some others. However, such an extension of authority to INS would necessitate delineation of developed nations which we would not wish to do because of the political ramifications from countries not on the list. Furthermore, so few cases are involved that an exception to the general procedures would not be worthwhile.

I hope the increased flexibility provided your office outlined above regarding Chinese from Hong Kong will be helpful to you.

Sincerely,

Raymond W. Laugel

Raymond W. Laugel
Director
Office of Refugee and
Migration Affairs

UNITED STATES GOVERNMENT

Memorandum

TO : District Directors - Boston, Buffalo, Hartford, Newark, New York, Portland and St. Albans
Officers In Charge - Albany and Providence

DATE: FEB 14 1973

NE 212.31a-P

FROM : E. J. Wildblood, Jr., Associate Deputy Regional Commissioner, Operations, Burlington

SUBJECT: Peoples' Republic of China Citizens From Hong Kong Who Request Asylum in the United States

The Central Office, after consultation with the Department of State, has been informed that there is no likelihood that citizens of the Peoples' Republic of China who fled to Hong Kong and have resided there for a substantial period of time will be persecuted within the meaning of the Convention on Refugees if they are deported to Hong Kong, nor is there any specific reason to believe that such persons will be returned by the Government of Hong Kong to countries where they will face persecution. The policy of the Department of State is to deny requests for asylum from such aliens provided they are deported to Hong Kong and not the Peoples' Republic of China and that the British Crown Colony of Hong Kong will accept them. Last minute requests concerning return of Chinese to Hong Kong as described above can be handled by this Service without consultation with the Department of State. It must be understood, however, that such aliens will have the benefits available to them in deportation hearings including that of withholding deportation under section 243(h) and the application of the Convention on Refugees where that is appropriate.

Any questions concerning individual asylum requests in a case which appears to be politically sensitive may be telephoned to the Department of State or handled in writing on an urgent basis by that organization.

Any other case not within the above or not within some other specific exception will continue to be handled under outstanding instructions. Any questions of interpretation should be referred to Travel Control, Central Office, for clarification.

E. J. Wildblood, Jr.

Mr. Mano Re: 1 5-23

20 West Broadway
New York, New York 10007

A15 664 513 DB/TB

April 9, 1973

LAM YIM YIM
190 E. 2nd Ave. Apt. 15
New York, New York

Dear Sir:

Reference is made to your request for political asylum submitted on March 29, 1973 and elaborated in an interview at this office on April 2, 1973. On the basis of the information presented, it is the opinion of this Service that you would not be subject to persecution on account of your race, religion, nationality, membership of a particular social group or political opinion if you return to Hong Kong. Therefore, your application for political asylum is denied.

You are in the United States unlawfully because you were permitted to land temporarily and solely in pursuit of your calling as a crewman and have remained longer than authorized. At a deportation hearing held on October 3, 1972 your deportability was established but you were granted the privilege of voluntary departure on or before November 15, 1972. Since you failed to depart from the United States an outstanding warrant of deportation was issued. Your deportation was stayed pending decision on your request for political asylum which has since been denied.

If you desire to further pursue your request for asylum, you may file a motion to reopen deportation proceedings for the purpose of introducing an application to withhold deportation under Section 243(h) of the Immigration and Nationality Act. However, the filing of such a motion will not stay your deportation.

Very truly yours,

Sol Marks

Sol Marks
District Director
New York District

CC: Jules Coven, Esq.
1 E. 42 St.
New York, N.Y. 10017

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIM MING, Plaintiff, -against- SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, and WILLIAM P. ROGERS, as Secretary of State of the United States of America, Defendants.	Index No. 73 Civ. 545
LAM YIM YIM, et al., Plaintiffs, -against- SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, Defendant.	Index No. 73 Civ. 1342

Memorandum Opinion

The plaintiffs in these two cases have petitioned the court for a preliminary injunction staying deportation orders now pending against them and the Government has cross-moved for summary judgment. The plaintiffs,[1] Chinese

[1] In addition to the two actions now before this court, 127 other separate, but similar, actions have been filed seek-
[Footnote continued on following page.]

aliens arriving in this country as seamen on ships out of Hong Kong, seek asylum here as refugees under the provisions of the United Nations Protocol Relating to the Status of Refugees (hereinafter "the Protocol"), 19 U.S.T. 6223, T.I.A.S. No. 6577, and the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter "the Convention"), 19 U.S.T. 6259, T.I.A.S. No. 6577.

The jurisdiction of this court is invoked pursuant to 5 U.S.C. §§702-706, 8 U.S.C. §1329 and 28 U.S.C. §2201, et seq. The Government does not contest jurisdiction. In an action similar to this, Kan Kam Lin v. Rinaldi, Civ. Action No. 1823-72 (D.N.J. July 2, 1973), jurisdiction was found to exist pursuant to 8 U.S.C. §1329. I follow the holding in that case on this point and find that jurisdiction is properly asserted. And see Buckley v. Gibney, 332 F. Supp. 790

[Footnote continued from preceding page.]
ing a stay of deportation. Counsel for all the plaintiffs and the Government have agreed to submit only two actions, chosen as factually and legally representative of the claims of all plaintiffs, for decision. Counsel have further stipulated to be bound in each of these other actions by the court's decision in these two cases. A complete list of the other actions involved is attached as an appendix.

(S.D.N.Y.), aff'd, 449 F.2d 1305 (2d Cir. 1971), cert. denied, 405 U.S. 919 (1972).

I

Factual Background[2]

Chim Ming:

Chim Ming was born in China in 1919 and maintained continuous residence there until 1955. He then migrated to Hong Kong, was issued appropriate papers, became a seaman and was so employed from 1955 to 1967. Plaintiff's wife and three of his children remain in China and a fourth child lives in Hong Kong. In April 1967, after deserting his ship in Newark, New Jersey, he was permitted to enter this country as a non-immigrant crewman authorized to remain for a period of twenty-nine days. Section 252 of the Immigration and Nationality Act (hereinafter "the Act"), 8 U.S.C. §1282.

---

[2]The statement of facts, which is drawn from the Government's affidavit in opposition to a motion for a preliminary injunction, has been conceded by plaintiff's attorneys to be accurate.

The plaintiff did not depart this country at the end of the authorized 29-day stay. He was apprehended on January 26, 1968, and deportation proceedings were begun. At the hearing plaintiff conceded deportability and by order of the Special Inquiring Officer, dated February 9, 1968, he was ordered deported. After being released on bond Chim Ming failed to surrender for deportation and was not again apprehended until 1972. Provisions were made for his deportation on December 1, 1972, but on November 24, 1972, plaintiff submitted a request for political asylum. A hearing on this application was held and pursuant to then current procedures, the Department of State was asked for an advisory opinion. The Department concluded that since plaintiff had not demonstrated that he was a political refugee, his deportation was appropriate.

The plaintiff was notified on January 16, 1973, that his request for asylum had been denied but that he could request a temporary stay of deportation pursuant to §243(h) of the Act, 8 U.S.C. §1253(h), if he could establish that he would be subject to persecution in Hong Kong. Plaintiff concedes he is not entitled to relief under this section and has instituted this action to prevent deportation under the provisions of the Protocol and the Convention. The court has issued

a temporary restraining order with the Government's consent, enjoining deportation until these issues are resolved.

Lam Yim Yim:

Lam Yim Yim was born in China in 1933 and lived there until 1961 when he entered Hong Kong. His wife, parents and five children remain in China. The plaintiff was permitted to enter this country as a non-immigrant crewman while his ship was in port for a period not to exceed 29 days. Section 252 of the Act, 8 U.S.C. §1282. The plaintiff, after entry, deserted his ship and remained in this country beyond the authorized period.

Lam Yim Yim was apprehended on September 21, 1972 in New York City and deportation proceedings were begun, culminating in a hearing on October 3, 1972 at which plaintiff conceded deportability. The Special Inquiring Officer found him deportable and granted his request of voluntary departure no later than November 15, 1972. The plaintiff did not leave this country as required and on March 16, 1973 a warrant of deportation was issued against him.

On March 27, 1973 Lam Yim Yim submitted a request for political asylum and a hearing was held on that application on April 2, 1973. Unlike the case of Chim Ming, the Immigration and Naturalization Service, without consultation with the Department of State, concluded that the plaintiff was not a political refugee.[3] On April 9, 1973 Lam Yim Yim was notified of this decision and advised of his right to seek further relief pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h), as a person subject to persecution in Hong Kong. Plaintiff, conceding the inapplicability of that statute to his case, initiated this action seeking relief pursuant to the Protocol and the Convention. The court has temporarily restrained deportation, with the Government's consent, pending determination of the issues raised here.

---

[3]This change in procedure, effectuated between the time of Chim Ming's refugee hearing and Lam Yim Yim's hearing, is concededly the only significant distinction between these two cases. The plaintiffs each raise the identical claims under the Protocol and the Convention, but in addition, Lam Yim Yim attacks the propriety of these revised procedures. This distinct aspect of his case will be discussed separately after joint issues are disposed of.

II

The Protocol and The Convention

On October 4, 1968, the United States Senate approved, effective November 1, 1968, the United Nations Protocol Relating to the Status of Refugees. 19 U.S.T. 6257. The Protocol provides in Article 1 that except for certain technical alterations:

> "1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention [relating to the Status of Refugees] to refugees as hereinafter defined."

The Convention (as modified by the Protocol) defines a "refugee", in Article 1, A(2), as any person who

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 32 of the Convention, made applicable to the United States through the Protocol, provides in pertinent part:

Expulsion

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

The parties have narrowed the issues to 1) whether the plaintiffs are in fact refugees within the meaning of the Convention and 2) whether, if they are refugees, they are entitled to protection under Article 32 of the Convention. For the purposes of this opinion it will be assumed that plaintiffs are refugees. On that assumption, we proceed to a determination of the second question.

By its own records, Article 32 prohibits the contracting States from expelling refugees "lawfully in their territory" except for national security reasons. No national security issues have been raised by the Government, and we are required only to define the phrase "lawfully in their territory".

The plaintiffs ask the court to disregard the accepted and common definitional usage of the term "lawfully". They argue that unless this approach is adopted the treaty would be "a nullity" since most refugees are, because of their desperate situations, in the country illegally. The plaintiffs offer no

historical or legislative support, or legal precedent for their position.

The Government, on the other hand, argues that the word "lawfully" is critical to a proper interpretation of Article 32 and that its meaning is clear and unequivocal; and thus that in the context of this lawsuit, the court must look to the immigration laws of this country to determine the lawfulness of an alien's presence. The Government's position is supported by the treaty's history, its legislative history in the Senate, court rulings, and the clear meaning of the words in question.

The Treaty:

The United Nations Ad Hoc Committee on Statelessness and Related Problems which drafted Article 32 has stated:

> "The expression 'lawfully within their territory' throughout this draft Convention would exclude a refugee who while lawfully admitted has overstayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission." Report, U.N.E.C.O.S.O.C. at 47, U.N. Doc. E/1618/Corr. 1/E/AC.32/5/Corr. 1 (March 2, 1950).

The Committee later elaborated on its thinking:

> "The Committee decided that it was not always necessary to insert in the text definitions of expressions used. However, since some question was raised as to the phrase 'lawfully in the territory', the Committee expressed the view that, in any event, a Contracting State may consider that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn." Report, U.N.E.C.O.S.O.C. at 11, U.N. Doc. E/1850/E/AC.32/8 (August 25, 1950).

Furthermore, in a letter to counsel in a similar action, the Deputy Representative of the United Nations High Commissioner for Refugees, quoting directly from instructions received from his Geneva headquarters, states, in part:

> "In determining whether a refugee is 'lawfully in the territory' of a Contracting State, regard must be had to all the circumstances of his presence there, and in this respect the manner in which he originally entered the territory, i.e. lawfully or unlawfully, is not the only decisive factor.
>
> "Art. 31 of the 1951 Convention recognizes the possibility that the status of a refugee who has entered illegally the territory of a Contracting State may subsequently be regularized. Conversely, the stay of a refugee who has entered in a regular manner, may subsequently become unlawful. This would for example be the case if the authorities of the country are not prepared to grant him residence beyond the

> limited period for which he was admitted or if they withdraw his residence permission on the ground that he has not complied with the conditions under which he was admitted, e.g. to pursue his studies. As long as his stay is 'lawful,' even though admitted temporarily, he can only be expelled on grounds of 'national security and public order.' If, however, his stay ceases to be 'lawful' in the circumstances described above, he is no longer 'lawfully in the territory of the Contracting State' and may therefore not invoke the special protection of Art. 32 of the 1951 Convention." Affidavit of Joseph Marro in Opposition to a Motion for a Preliminary injunction sworn to on April 19, 1973 at Exhibit A. (Emphasis in original.)

History of United States Action on the Protocol:

The history of the adoption of the Protocol by this country makes clear that all the individuals and institutions involved in that process had a continuing belief that the Convention would not alter or enlarge the effect of existing immigration laws, chiefly because it was felt that our immigration laws already embodied the principles of the Convention. Thus, in transmitting the Protocol to the President, the Secretary of State noted that "United States accession to the Protocol would not impinge adversely upon the laws of this country." S. Exec. K. 90th Cong., 2d Sess. at VII. President Johnson, in forwarding the Protocol to the Senate for approval, stated:

> "It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those feeling persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere. This impetus would be enhanced by the fact that most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries." S. Exec. K, 90th Cong., 2d Sess. at III.

In the Senate the State Department submitted the statement of Mr. Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, which points out that

> ". . . [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act.

* * *

"[The President] has pointed out that since refugees in this country already enjoy the protection and rights which the Protocol seeks to secure everywhere, United States accession should help to advance the Protocol and acceptance of its humane standards in other states whose treatment of refugees is less liberal . . . . Even though the United States already meets the standards of the Protocol, formal accession would greatly facilitate our continuing diplomatic effort to promote higher standards of treatment for refugees and more generous practices on the part of countries whose approach to refugees is less liberal than our own." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 6-7

The following exchange at the Committee hearings also provides some insight as to the Senate's understanding of the Protocol:

"SENATOR SPARKMAN. Is there anything in here that conflicts with our existing immigration laws?

MR. DAWSON. I would answer that briefly and then ask Mrs. McDowell [of the Treaty Section, Office of the Legal Adviser, Department of State] to give a more authoritative answer. I would say that Article 32 which prohibits the expulsion of a refugee who is lawfully in this country to any country except on grounds of national security or public order would pose certain questions in connection with section 241 of our Immigration and Nationality Act, which states the deportation provisions. But I do not believe it would be in conflict. We believe most of those grounds in 241 are grounds which can be properly construed as having the basis of national security or public order, and we also are assured that those relatively

limited cases which perhaps could not be so construed could be dealt with by the Attorney General without the enactment of any further legislation . . .

MRS. McDOWELL. I think Mr. Dawson has covered it very well. We are assured by the Justice Department that this is their view. That the existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this convention which are not presently contained in the Immigration and Nationality Act.

For example, section 241 of the Act allows the Attorney General to deport an alien for certain stated reasons. Most of these are criminal conduct of various kinds or subversive activities.

"There are two categories, only two, that we think are not covered, and these are the deportation of an alien for reasons of mental illness or deficiency, where he has become institutionalized for that reason, or deportation on grounds that he has become a public charge. These two areas would not be enforced against refugees if the protocol were in force." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 8.

Prior Decisions:

It appears that in only two other cases have the issues here raised been considered. Kan Kam Lin v. Rinaldi, Civ. Action No. 1823-72 (D.N.J. July 2, 1973); and In re Dunar, Board of Immigration Appeals, Interim Decision File No. A14 616, 395 (San Francisco April 17, 1973). In both cases the history discussed above was

reviewed and it was decided that an alien who overstayed the legal limits of his admission into this country was no longer "lawfully" here and therefore could not claim the benefits of the Convention.

Determination:

The plaintiffs were legally admitted to this country pursuant to 8 U.S.C. §1282 which permits an immigration officer "in his discretion . . . [to] grant the [alien] crewman a conditional permit to land temporarily pursuant to regulations prescribed by the Attorney General . . . and for a period of time, in any event, not to exceed" twenty-nine days. Each plaintiff improperly remained longer than the maximum permissible time and after appropriate hearings was found to be unlawfully in this country and deportable.

The immigration laws make certain provisions for achievement of lawful status by those here unlawfully, see e.g., §§244(a), 245 and 249 of the Act, 8 U.S.C. §§1254(a), 1255, 1259. As was suggested in In re Dunar, supra, at 9:

> "If we accepted respondent's view, all these, as well as the deportation provisions of section 241(a), would be rendered nugatory in the case of an

> alien refugee who entered lawfully as a nonimmigrant and remained unlawfully. If such an alien achieves nondeportability under Article 32 of the Convention, he becomes in effect a permanent resident. There is nothing in the legislative history of this provision to indicate that the Senate had any notion that this result would follow accession. Indeed, there is every indication that those who framed Article 32 on behalf of the United Nations never intended to saddle a host country with any such limitation."

Plaintiffs suggest that the strict interpretation of the "lawfully" renders the Convention without meaning since refugees are often in the country unlawfully. The simple answer here is that the Contracting States did not intend to protect refugees who unlawfully entered the country. Moreover, the cases now before me do not raise the more sympathetic claim of a refugee, forced to leave his own country covertly, who entered here illegally. The plaintiffs in these cases each enjoyed a period of legal status in this country and could have made their claims under the provisions of the Convention during that time - they did not do so.

The plaintiffs also suggest that new regulations governing the issuance of travel documents justify decision in their favor. 38 Fed. Reg. 8238 (1973) sets forth these amendments to 8 C.F.R. Plaintiffs point specifically to Part 223a, Refugee Travel Document, §223a.3, Eligibility, which provides:

> "Any alien physically present in the United States may apply for a refugee travel document if he believes he is a refugee. A refugee travel document shall be issued to a refugee whose presence in the United States is lawful unless compelling reasons of national security or public order otherwise require. A refugee travel document may be issued in the exercise of discretion, to any other refugee unless reasons of national security or public order otherwise require; sympathetic consideration shall be given to such an application unless the Service intends to expel or exclude the alien from the United States. . . ."

Plaintiffs contend that "[f]rom this regulation it appears obvious that all refugees in the United States may obtain a travel document which would permit such refugees to reenter the United States." Plaintiffs' Memorandum of Law, at 18. They conclude that if a refugee can leave and return he ought to be allowed to remain without leaving.

The fallacy, however, is that it is not "obvious" at all that "all refugees" may get travel documents. Indeed, the regulation, in language quite similar to the Convention, provides that the travel document shall issue only if the presence of the refugee in this country is "lawful". The fact that this country may, in its discretion, issue documents to refugees here unlawfully, is not only in conformance with Article 28 of the Convention, but is of no help to the plaintiffs, since the Convention in-

dicates that the purpose of this discretionary power was to permit travel by those who cannot be deported because they will not be accepted elsewhere.

The overwhelming and indeed uncontroverted evidence of the meaning of the Convention as revealed in all stages of its creation, adoption and interpretation lead me to conclude that plaintiffs' unlawful presence in this country precludes their invocation of rights under Article 32.

Plaintiffs' only remaining claim in this regard is that insofar as their claim under the Protocol is concerned, they never received a hearing on the lawfulness of their presence. Of course, in all cases either the Department of State or the Immigration and Naturalization Service, after a hearing made a determination that the aliens were not refugees but did not <u>at that time</u> consider the legal status of the plaintiffs. Since I have assumed, for the purposes of this decision, that the plaintiffs were refugees these hearings are not relevant. That is not to say, however, that the plaintiffs have not had the opportunity to contest a finding of unlawful status.

In each case the alien was originally afforded a deportation hearing, the precise purpose of which was

to determine the status of their presence here. In both cases the plaintiffs admitted the unlawfulness of their status here, but even had they not done so (I doubt all the plaintiffs in all the related cases did so) those deportation hearings, followed by appropriate administrative and judicial appeals, were proper and adequate for a determination of the lawfulness question. The findings there made cannot now be attacked collaterally in this action, nor may plaintiffs claim they were not afforded the full panopoly of due process rights in regard to the determination of their unlawful presence here. Kan Kam Lin v. Rinaldi, supra.

State Department Review:

When the Immigration and Naturalization Service receives a request for asylum as a political refugee it conducts a hearing to determine the facts of the case. Prior to January 1973, the Service would then send a brief statement of facts to the State Department for an opinion as to propriety of considering the alien a political refugee. If such status was denied to the alien he would be so advised by the Service.

By a letter of January 22, 1973 from Mr. Raymond W. Tangel, Director, Office of Refugee and Migration

Affairs, Department of State, to Mr. James Greene, Associate Commissioner for Operations, Immigration and Naturalization Service, the procedure for the review of refugee status requests was changed. That letter provides in pertinent part:

> ". . . We recognize the problems raised by last-minute requests for asylum from aliens who could have applied earlier for a hearing under Section 243(h) of the Immigration and Nationality Act.
>
> "In your letter you refer to the specific problem of citizens of the Peoples' Republic of China who fled to Hong Kong and have resided there for a substantial period of time. There is no likelihood that these aliens will be persecuted within the meaning of the Convention on Refugees if they are deported to Hong Kong nor have we any specific reason to believe that any of such persons will be returned by that government to countries where they will face such persecution. Our policy is to deny such requests for asylum provided: (a) they are deported to Hong Kong and not the Peoples' Republic of China and (b) that the Colony will accept them.
>
> "We agree that such last minute requests concerning the return of Chinese to Hong Kong as described above can be handled by the Immigration and Naturalization Service without consultation with the Department through our office. We understand from your letter that during the deportation hearings all such aliens will have available to them the various benefits of the Immigration and Nationality Act, including withholding of deportation under Section 243(h) and the application of the Convention on Refugees whenever appropriate in their cases. . . ."

The plaintiff Lam Yim Yim objects to this new procedure claiming not that it in any way violates his

rights directly, but rather that it is indicative of summary disposition of these cases, rather than the individual consideration to which each is entitled.

Inasmuch as this decision has assumed arguendo that all plaintiffs were refugees it is not necessary to decide whether the administrative determination that plaintiff was not a refugee was properly arrived at. It should be noted, however, that while due process certainly requires that an alien receive full opportunity to present his claims, there is nothing in either the Convention or laws of this country which dictates that the State Department must be the final arbiter of all claims for refugee status. Thus, the mere fact that the Service, rather than the State Department, reviews an alien's claims would not appear to be objectionable in itself. In any event, this is not the proper case to review the applicable procedures because this decision rests solely on the unlawfulness of plaintiffs' presence and as to that issue they have had protection of adequate due process safeguards.

The plaintiffs' motion for a preliminary injunction is denied and the temporary restraining order hereto-

fore entered is vacated. The defendants' motion for summary judgment is granted.

SO ORDERED.

Dated: New York, New York
November , 1973

ROBERT L. CARTER
U.S.D.J.

APPENDIX

The following is a list of those cases in which the attorneys have agreed to be bound by the decision in the two principal actions. In each case the defendant is Sol Marks, as District Director of the Immigration and Naturalization Service for the District of New York. All of these cases were initially assigned to me, except those indicated by the initials of other judges.*

Plaintiff	Docket No.	
Chow Choi Lam	72 Civ. 5252	
Wong Yi Chun	72 Civ. 5422	(CES)
Sze Hak Yung	73 Civ. 600	
Kam Chung	73 Civ. 645	
Wong Ting Yan	73 Civ. 942	
Wong Cheue Man	73 Civ. 982	
Lam Hok Ching	73 Civ. 1015	(RJW)
Sze Cho Yung	73 Civ. 1039	(MEF)
Chan Ping Chung	73 Civ. 1045	
Tsang San Fat	73 Civ. 1062	
Cheung Kwong Wa	73 Civ. 1149	
Cheng Ka-Kan	73 Civ. 1177	
Chan Wun Yin	73 Civ. 1203	
Shek Lung Ping	73 Civ. 1290	

*Judges:

CES - Charles E. Stewart, Jr.
TPG - Thomas P. Griesa
RJW - Robert J. Ward
MEF - Marvin E. Frankel
LPM - Lloyd F. Mac Mahon
MIG - Murray I. Gurfein
LWP - Lawrence W. Pierce
EW - Edward Weinfeld
AB - Arnold Bauman
MEL - Morris E. Lasker
CLB - Charles L. Brieant, Jr.
MP - Milton Pollack
IBW - Inzer B. Wyatt
DBB - Dudley B. Bonsal
JMC - John M. Cannella
WK - Whitman Knapp

Plaintiff	Docket No.	
Cheng Ting Shing	73 Civ. 1310	
Chan Chun Ping	73 Civ. 1363	
Chong Kit Sing	73 Civ. 1384	
Cheng Kai Kwan	73 Civ. 1406	
Lee Kwong Ming	73 Civ. 1498	
Wong Siu Po	73 Civ. 1507	
Cheik Shu Ming	73 Civ. 1509	(CES)
Yam Hin Lam	73 Civ. 1532	
Lam Tsan Wai	73 Civ. 1533	
Chan Ming Kwun	73 Civ. 1534	
Shek Lap Kin	73 Civ. 1535	
Lam Ah Luk	73 Civ. 1612	
Li Wing Yuem	73 Civ. 1614	
Lam Shing Ho	73 Civ. 1635	
Tung Wing-Ming	73 Civ. 1679	
Pang Kin Vin	73 Civ. 1680	
Sze Cho Kwong	73 Civ. 1685	(LWP)
Siu Chung	73 Civ. 1745	
Chuen Sum Chan	73 Civ. 1747	
Chan Kwok Chuen	73 Civ. 1766	
Man Ying Muk	73 Civ. 1784	
Tsoi Kueng	73 Civ. 1830	
Yu Chun Keung	73 Civ. 1867	
Sze Hang Kwun	73 Civ. 1879	
Lai Hing Wo	73 Civ. 1939	
Lee Shing	73 Civ. 1986	
Tang Wai Man	73 Civ. 2067	(AB)
Chan Pun Shui	73 Civ. 2075	
Yau Yue Wong	73 Civ. 2121	
Kwong-Ho Lam	73 Civ. 2198	
Man Cheong Yan	73 Civ. 2199	
To Che Sze	73 Civ. 2211	
Wong Hung Chi	73 Civ. 2232	
Cheung Kin Yu	73 Civ. 2316	
Ng Ki Yeung	73 Civ. 2346	
Man Shui Hing	73 Civ. 2364	
Wong Bing Kau	73 Civ. 2365	
Sze Mau Fong	73 Civ. 2366	
Cheung Lin Kwon	73 Civ. 2401	
Yeung Kwok Ching Au	73 Civ. 2457	
Lam Sai Wing	73 Civ. 2459	
Yu Fong Chan	73 Civ. 2466	
Lam Kung Shek	73 Civ. 2481	(MEL)
Yau Mo Chum	73 Civ. 2525	
Chan Sui Shun	73 Civ. 2578	
Chan Tak Ming	73 Civ. 2581	
Bo San Chow	73 Civ. 2615	
Cheung Sai Cheung	73 Civ. 2624	
Cheung Ting Woon	73 Civ. 2645	

Plaintiff	Docket No.	
Lam Sau Shing	73 Civ. 2700	(LFM)
Pok Loong Yu	73 Civ. 2732	(MIG)
Chu Yi Cheuk	73 Civ. 2792	
Leung Shun Tai	73 Civ. 2794	
Cheng Sum Ching	73 Civ. 2916	
Wong Wun Tung	73 Civ. 2923	
Tai Cheung Fung	73 Civ. 2924	
Leung Muk Yiu	73 Civ. 2925	
Pong Wai Kuen	73 Civ. 2950	
Chan Shun Fai	73 Civ. 2951	
Wong Cho Cheuk	73 Civ. 3005	
Cheng Sin Mui	73 Civ. 3006	
Cheng Chuen To	73 Civ. 3017	
Lam Yuk	73 Civ. 3032	
Yuen Kwun Wong	73 Civ. 3158	
Cheng Sau Ching	73 Civ. 3213	(MP)
Hou Hon Cheng	73 Civ. 3222	(CHT)
Kwok Kwong	73 Civ. 3228	
Kam Tai Cheung	73 Civ. 3355	
Yan Suen Poon	73 Civ. 3374	
Wong Hoi Man	73 Civ. 3420	
Lau Kar Tae	73 Civ. 3425	
Sang Lam	73 Civ. 3430	
Miu Wai Wing	73 Civ. 3450	(IBW)
Hoi Yim Tsang	73 Civ. 3490	
Wan Man	73 Civ. 3513	
Lau Kwan Wong	73 Civ. 3522	
Hoi-Ching Chan	73 Civ. 3537	
Chun Fat Cheung	73 Civ. 3613	
Ching Yi Yau	73 Civ. 3683	
Kwai Cheung	73 Civ. 3711	
Hoi Koon Lam	73 Civ. 3712	
Pang Sau	73 Civ. 3713	
Lin Cheung	73 Civ. 3749	
Sum Ang Cheng	73 Civ. 3792	
Chun Fui Lam	73 Civ. 3795	
Yuk Yim Lau	73 Civ. 3803	
Cheung Kwok Nang	73 Civ. 3818	
Sum Piu Cheung	73 Civ. 3875	
Hsuian Chuan Lu	73 Civ. 3897	
Fuk Chong Cheng	73 Civ. 3953	
Fu Shing Lung	73 Civ. 3957	
Sing Lee	73 Civ. 3958	
Che Way Ting	73 Civ. 3959	
Tsang Ah Choy	73 Civ. 3963	(MIG)
Kei Ngok Chan	73 Civ. 4070	(JMC)
Young Kung Lun	73 Civ. 4159	
Chung Kai Kun	73 Civ. 4236	

Plaintiff	Docket No.
Hung Kwong Yuen	73 Civ. 4266
Kiu Lai	73 Civ. 4275
Sze Yi Chun	73 Civ. 4306 (LFM)
Cheung Lung Chan	73 Civ. 4425
Ka Lun Cheung	73 Civ. 4427
Chan Hoit Wan	73 Civ. 4435 (WK)
Man Hau Li	73 Civ. 4454
Foon Chi Cheng	73 Civ. 4467
Chan Chai On	73 Civ. 4518
Ah Mau Ha	73 Civ. 4528
Ying Ki Ho	73 Civ. 4529
Wong San Man	73 Civ. 4537
Mei Ming Cheng	73 Civ. 4602
Ping Pai Lam	73 Civ. 4646
Kong Siu Koon	73 Civ. 4875
Shek Luk Tsui	73 Civ. 4942

United States District Court
FOR THE
Southern District of New York

CHIM MING,

Plaintiff,

-against-

SOL MARKS, etc., et ano.

Defendants.

LAM YIM YIM, et al.,

Plaintiffs,

-against-

SOL MARKS, etc.,

Defendant.

OPINION

ROBERT L. CARTER

FPI-81—11-6-78-1M-8476

U.S. COURT OF APPEALS:2nd CIRCUIT

CHIM MING,
Plaintiff-Appellant,

against

SOL MARKS, as Director of Immigation et al,
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 30th day of April 1974 at Foley Square, Fed. Court House

deponent served the annexed Brief and Appendix upon

Paul J. Curran, United States Attorney

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 30th day of April 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975